FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 92.

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

ROBERT E. HANNON,
3053 Castro Valley Boulevard,
Castro Valley, California,
Attorney for Petitioners.

Subject Index

Table of Authorities Cited

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 92

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

Comes now the above named petitioners and in reply to the brief of the respondent on file herein respectfully submits the following.

DESERTION AND UNAUTHORIZED ABSENCE ARE IRRELEVANT TO THE ISSUES INVOLVED IN THIS CASE.

At page 15 of its brief, the respondent states:

"Although the Missing Persons Act does not specifically address itself to the problem of those

> comparatively few American soldiers who in the manner of petitioners break their obligations and oaths to serve the United States faithfully, the Act does contain a further indication that such persons should not be paid. It specifically provides that '[t]here shall be no entitlement to pay' for deserters[2] and others 'absent without authority.'"

Elsewhere throughout its brief the respondent attempts to compare the alleged misconduct of the petitioners with the military offenses of treason and unauthorized absence. Apparently this is done either in an attempt to bring this case within the prohibition of 50 USC App. 1002 against payment to missing or captured persons who absent themselves from their "post of duty" without authority, or to reconcile the facts of this case with other cases and Army Regulations dealing with unauthorized absence or desertion.

That the petitioners here were not and could not be guilty of the military offense of treason or absence

[1]The "comparatively few American soldiers" here referred to by the respondent constituted one-third of all captured American servicemen. Yet of all of these, including those convicted of the military equivalent of treason (Uniform Code of Military Justice 1951, Articles 104 and 105, 10 USC 904, and 10 USC 905), your petitioners are the only former prisoners of war that the government has refused to pay (see Brief of Petitioners, Footnote 12, page 28).

[2]This portion of 50 USC App. 1002 reads as follows:

> "That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority . . ."

It is noted that the section says nothing about desertion and limits itself to one of the four types of unauthorized absence—absence from post. (See Uniform Code of Military Justice, 1951, Article 86, 10 USC 886.)

from post is apparent from a reading of the *Articles of War*, the *Articles of the Uniform Code of Military Justice*, 1951, and the *Manual for Courts Martial*, 1951.

To be guilty of desertion there must be an unauthorized absence coupled with an intent to desert. Uniform Code of Military Justice Article 85—Desertion (10 USC 885); *Manual for Courts Martial, U.S. Army*, 1949, page 197; *Manual for Courts Martial*, 1951, page 310.[3] In this instant case there could be no unauthorized absence, thus there could be no desertion.

Since the petitioners were prisoners of war the United States had no physical control over them and thus could not and did not assign to them a "post of duty."[4] Additionally, since the petitioners were prisoners of war their movement was subject to the will of their captors.[5] It would appear that in all respects the petitioners were in the same position as a dishonorably discharged prisoner serving the sentence of a

---

[3]The *Manual for Courts Martial U.S. Army*, 1949, was effective on February 1, 1949; the *Manual for Courts Martial U.S.*, 1951, was effective on May 31, 1951.

[4]10 USC App. 1002.

[5]That the Department of the Army did not and does not consider that the petitioners were in a status of absence is shown by a number of factors. First, the Army has never carried the petitioners on its rolls as absentees or deserters. Second, when the petitioners returned to the United States they were not charged with desertion or unauthorized absence, but were charged with violations of Articles 104 and 105 of the Uniform Code of Military Justice (supra). Third, the "head of the department concerned" has never made an official determination that the petitioners were "absent from (their) post of duty without authority". Such an official determination would be necessary under 10 USC App. 1002.

court martial. In this regard the *Manual for Courts Martial U.S. Army,* 1949, states at page 202:

> "A general prisoner whose dishonorable discharge has been executed has no 'command, guard, quarters, station or camp' within the meaning of Article 61, since he is in confinement not because of military duty but only because of compulsion. Accordingly, such a prisoner may not be charged with absence without leave under Article 61. . . ."

Since the petitioners were not and could not be in a status of absence or desertion, that provision of 50 USC App. 1002 relative to a person "absent from his post of duty" has no application to the petitioners' claim and is not a condition of their entitlement under the act.[6]

The fact that Congress expressly excluded from entitlement under 50 USC App. 1002 persons who absented themselves from their "post of duty" and also excluded Philippine scouts who "demonstrated by their acts abandonment of their loyalty to the United States"[7] does not in any way demonstrate that Congress also intended to exclude American

---

[6] In Footnote 9, page 16 of its brief the respondent states:

> "The desertion or unauthorized absence for which the Missing Persons Act precludes pay need not antedate the serviceman's capture; it can commence after capture and while he is in the enemy's hands."

To your writer this is extremely doubtful since a prisoner of war has no post of duty. Undoubtedly the Congress in including this provision in the statute was referring to a soldier who was in the status of absent when captured, in which case he would be in the same circumstance as a soldier arrested by civil authority. (See *Manual for Courts Martial,* 1951, page 315.) The Congress could also have been referring to a soldier who absented himself after repatriation. In either event the same would have no application here.

[7] See Footnote 12, page 17, Brief of the United States.

Prisoners of War who misconducted themselves. In fact the inclusion of these two express exceptions demonstrates a Congressional intent not to exclude American Prisoners of War who misconducted themselves. By the two express exclusions, Congress has demonstrated that it was aware of the fact that all prisoners of war do not conduct themselves as they should. Congress enacted 50 USC App. 1002 during World War II. It re-enacted it after World War II and during and after the Korean War.[8] Congress was aware of the fact that American Prisoners of War in each of these two wars misconducted themselves,[9] yet it did not exclude them from entitlement in any of the re-enactments of 50 USC App. 1002.[10] By rules of statutory construction the exclusion of persons guilty of certain express types of misconduct, while aware of other types of misconduct, demonstrates a Congressional intent not to exclude persons guilty of the latter type of misconduct.[11]

---

[8]See Footnotes 6, 7 and 8, page 14, Brief of the United States.

[9]During World War II there were a number of American prisoners of war who misconducted themselves. (See *Petition of Provoo*, 350 U.S. 857; *Hirshberg v. Cooke*, 336 U.S. 210; which latter case resulted in the Congressional enactment of Article 3-a of the Uniform Code of Military Justice, supra, see House Report No. 491, H. R. 4080, p. 5, 81st Congress, 1st Session.) Likewise during the Korean War there were many American prisoners of war who misconducted themselves. (See Brief of Petitioners, Footnote 12, page 28, and Footnote 13, page 30.)

[10]The Congressional reasoning in not excluding American prisoners of war might have been predicated upon its awareness of "subtle brainwashing techniques" (descending opinion below R. 45) or that "the line between loyalty and disloyalty in a prison camp may not always be an easy one to draw" (Brief of the United States, page 28).

[11]*Statutory Construction*, Crawford Law Book Company, 1940, p. 195; *Fullinwider v. Southern Pacific Railway Company*, 248 U.S. 409, 412.

LANDERS, KELLEY AND KINGSLEY CASES.

The respondent relies heavily upon two cases in an attempt to circumvent the age-old principle of military law that there cannot be a forfeiture of military pay without the sentence of a court martial.[12]

The first of these cases is that of *United States v. Landers* 92 U.S. 77. The respondent quotes from the *Landers* case on page 18 of its brief but the quotation, taken out of context, as it is, is meaningless. The *Landers* case is readily distinguishable from the instant case in many particulars.

First: The *Landers* case was a case involving "forfeiture of pay due to desertion." There are several Army Regulations which have special application to the pay of an absentee or deserter. These Regulations are peculiar to absence offenses and have absolutely no application to any other military offense.[13] Thus,

---

[12]See *Peiffer v. United States* (1943) 96 Ct. C. 344; *F. de Carrington v. United States* (1911) 46 Ct. C. 279; *Walsh v. United States*, 43 Ct. C. 225 at 231; *White v. United States* (1931) 72 Ct. C. 459.

[13]Army Regulation 35-1030 authorized the forfeiture of the pay of an absentee during the period of his absence. However, it is stressed that this Army Regulation applied only to absentees and did not apply to any other offense. On December 2, 1957 A.R. 35-1030 was superseded by A.R. 37-104, Section IV.

It is interesting to compare A.R. 35-1030 which was promulgated by the Secretary of the Army with Article 57 of the Uniform Code of Military Justice 1951 (10 USC 857) which was enacted by Congress. This Congressional act provides in part:

> "Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority.

even if the *Landers* case did authorize "forfeiture" without a court martial for desertion, the decision would have no application to the instant case, as your petitioners were not, and could not, be guilty of desertion (see supra, page 3).

Second: The *Landers* case did not deal with an administrative forfeiture. It dealt with a forfeiture imposed by sentence of a court martial. The court at page 80 states:

> "We must, therefore, presume, as the case is presented to us, that the petitioner was brought to trial for his offense before such a court, and was convicted, and that the forfeiture imposed was the sentence of the court."

The petitioner in the *Landers* case did not contest the validity of the forfeiture (*Landers* supra, page 80) but contended that his restoration to duty and subsequent honorable discharge purged the previous sentence by court martial and thus he was entitled to the

---

No forfeiture may extend to any pay or allowances accrued before that date."

This statute would clearly preclude any forfeiture of any pay without a court martial. Thus this section is in accord with the principles of military law stated by the Court of Claims in the various cases cited in Footnote 12, supra. Likewise this section would preclude a construction of 50 USC App. 1002 or R.S. 1288 in such a way as to deny the petitioners their pay.

See also Article 13 of the Uniform Code of Military Justice 1951 (10 USC 813) which states in part:

> "Subject to Section 857 of this title (Article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him. . . ."

Since forfeiture of pay is one of the penalties mentioned in Article 56 Uniform Code of Military Justice 1951 (10 USC 856) and in the *Manual for Courts Martial* 1951 (page 210) a forfeiture of pay prior to a court martial would be clearly invalid.

pay forfeited by the sentence of the court martial. The court held at page 80:

> "Assuming that the conduct of the soldier in this case, subsequent to his restoration to duty, may have entitled him to an honorable discharge, and that such discharge was not inadvertently granted, the discharge could not relieve him from the consequence of the judgment of the military court, and entitle him to the pay and allowances which the court had adjudged to have been forfeited."

In fact the court distinguished the *Landers* case from *United States v. Kelley* (infra) on the basis that Landers' forfeiture was a court martial sentence while Kelley's was administrative. See page 80:

> "In Kelley's case, as already stated, the deserter was restored to duty without trial, upon his voluntary return; and it was with reference to a case of that kind that the Judge-Advocate General gave the opinion, which is cited with approval by this court. In such a case, an honorable discharge of the soldier, as held by that officer, dispensed with any formal removal of the charge of desertion from the rolls of his company, and amounted of itself to a removal of any impediment arising from the fact of desertion to his receiving bounty."

Third: In footnote 14, page 18, of its brief, the respondent states:

> "It is important to stress that in *Landers* the Court specifically held that it was unnecessary to have a court-martial conviction for desertion in order to preclude the deserter from receiving pay

> for the past period, i.e., for the period prior to and including the time of desertion."

The court did not so hold, or if it did so hold, the holding is purely dicta, as Landers was in fact court-martialed.

It is more likely that the court in using the term "forfeiture," is using it in the sense of "checking" pay. It is noted that the court states, page 79:

> ". . . it is sufficient to justify a *withholding* of the monies that the fact appears upon the muster-rolls of his company." (Emphasis added.)

By use of the term "withholding" the court implies that if the person is subsequently acquitted of the absence or desertion his pay would be restored to him.

This reading of the case is further bolstered by the next sentence which reads:

> "If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department."

Likewise, this reading of the case is bolstered by the language on page 80 where the court distinguishes the *Landers* from the *Kelley* case on the basis of the court martial.

Fourth: On page 19 of its brief the respondent states:

> "The Landers holding, which is still in force . . ."

This statement is only accurate in the sense that Army Regulations permit forfeiture of pay during a period

of absence (see Footnote 13 supra). There is absolutely no authority anywhere in any of the Federal statutes for "forfeiture" of pay without a court martial for anything other than possibly an absence offense, and in fact the law expressly excludes such forfeitures (see Footnote 13 supra).[14] We are not here dealing with an absence offense.

Fifth: The *Landers* case cites with approval the case of *United States v. Kelley,* 15 Wall 34. Both the *Landers* case and subsequent authorities[15] cite the *Kelley* case for the general principle of law, and cite the *Landers* case for the exception. The general principle's law in the *Kelley* case is in accord with all the prior and subsequent precedent to the effect that it takes the sentence of a court martial to forfeit pay,[16] and that pay cannot be forfeited by the Administrative Act of the Department of the Army.[17]

---

[14]If the *Landers* decision were construed so as to authorize a "technical forfeiture" rather than a "withholding of pay" prior to trial, it probably would not be good law today even for an absence offense. As seen in Footnote 13 (supra) a court-imposed forfeiture is only effective from the date of sentence, and you cannot punish a serviceman prior to trial.

In addition, Article 56, Uniform Code of Military Justice (10 USC 856) provides in part:

> "A court shall not, by a single sentence which does not include dishonorable or bad conduct discharge, adjudge against an accused: Forfeiture of pay at a rate greater than two-thirds of his pay per month. Forfeiture of pay in an amount greater than two-thirds of his pay for six months."

In the *Landers* case the court (1) forfeited more than two-thirds pay without giving a dishonorable discharge or a bad conduct discharge, and (2) apparently forfeited pay in an amount greater than two-thirds for more than six months.

[15]13 A.L.R. 600.

[16]See Footnote 12.

[17]10 USC 857; 10 USC 813.

The second case that the respondent cites to overcome the principle of no forfeiture without court martial is the case of *United States v. Kingsley*, 138 US 87. In the *Kingsley* case the petitioner was administratively discharged from the Marine Corps as a person of bad character. After his discharge he sued in the Court of Claims for "retained pay" and "travel pay." Retained pay was special pay which "shall not be paid to the soldier until his discharge from the service and shall be forfeited unless he serves honestly and faithfully to the date of his discharge." The court held, page 90:

> "To entitle the soldier to his retained pay it is therefore necessary to show, first, his discharge from the service; second, an honest and faithful service to the date of his discharge."

And the court held, page 92:

> "This record shows a clear case of failure to furnish the honest and faithful service demanded by the statute."

Thus the holding in the *Kingsley* case is simply that the plaintiff has not earned the retained pay since he had not performed one of the "condition precedents" necessary to entitlement. Since he had not earned the pay he could not have "forfeited" it, since you cannot forfeit something you don't own. The court's holding is to the effect that the term "forfeited" as used in the act is used in a non-technical "sense of a disability incurred by non-performance of a contract." (Page 90.) The court stated, page 91:

"Indeed, the word in this connection means nothing more than an incapacity to recover . . ."

The *Kingsley* case is readily distinguishable from the instant case.

First: In the instant case there is no "condition precedent" of "honest and faithful" service in either 50 USC App. 1002 or R.S. 1288 unless we put it there by judicial legislation. Since there are no words of "incapacity to recover" in the statutes involved in the instant case, the refusal to pay is a forfeiture in the "technical sense."

Second: The court in the *Kingsley* case is dealing with a special pay given in addition to regular pay as a reward for a certain type of service (viz. honest and faithful service). This pay was only due and payable (viz. accrued) upon discharge. In the instant case we are dealing with regular pay earned before and after capture which is due and payable (viz. accrued) daily and is paid bi-monthly. A discharge is not a condition of entitlement. The "non-technical forfeiture" in the *Kingsley* case was not retroactive. The "technical forfeiture" in the instant case is retroactive.[18] The *Kingsley* case rather than being in conflict with the petitioners' entitlement under 50 USC App. 1002, bolsters their

[18]One collateral facet of the *Kingsley* case is of interest here. It is noted that the Congress in enacting R.S. 1281 conditioned entitlement to retained pay upon "honest and faithful service". This demonstrated that the Congress was aware of the fact that certain servicemen do not render honest and faithful service. Yet in enacting R.S. 1288 (Prisoner of War Act) at or about the same time, Congress did not condition entitlement to "honest and faithful service". Does this not demonstrate an intent not to have such a condition precedent in the Prisoner of War Act?

claim. After discussing the retained pay the court goes on to discuss the travel pay. The travel pay was not conditioned on honest and faithful service, but was conditioned on a discharge, except by way of "punishment for an offense." The court held, page 92:

> "We think this statute contemplates a discharge as a punishment inflicted by the judgment of a court martial or other military authority, for a specific offense, and not such a discharge as was issued in this case, for unfitness for service and general bad character. While this may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, we cannot consider such a discharge as 'a punishment for an offense' within the meaning of the statute. The question whether such punishment must necessarily be awarded by the judgment of a court martial, is not presented by the record, and we express no opinion upon the point."

But suppose there had been no condition at all on entitlement in the pay, as in the instant case. Certainly then, would not the court have agreed with the Court of Claims and held that this was a "technical forfeiture" requiring the sentence of a court martial?

REPEAL BY IMPLICATION.

On page 21 of its brief the respondent states:

> "Since the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R.S. 1288, any inconsistency or repugnancy between the two

statutes should be resolved in favor of the Missing Persons Act. (See e.g., *Posadas v. National City Bank*, 296 US 497, 503-505)."

The holding of the *Posadas* case at page 503 is as follows:

> "The *cardinal* rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either case, the intention of the legislature to repeal must be clear and manifest;* . . ." (Emphasis added.)

There is no irreconcilable conflict or repugnancy between R.S. 1288 and 50 USC App. 1002. Therefore, if there is to be a repeal by implication because 50 USC App. 1002 covers the whole subject of R.S. 1288, the "intention of the legislature to repeal must be clear and manifest." Considering the "cardinal rule is that repeals by implication are not favored," can it be said that Congress clearly intended to repeal R.S. 1288? Each of the acts were re-enacted several times. On several occasions R.S. 1288 was re-enacted after 50 USC App. 1002. For instance, 50 USC App. 1002 was originally enacted in 1942. (56 Stat. 143.) R.S. 1288 was re-enacted in 1952 as 10 USC 846. 50 USC

App. 1002 was re-enacted in 1951, 1952 and 1953.[19] 10 USC 846 was apparently re-enacted in 1956 when it became 37 USC 242.

In applying the second exception to the "cardinal rule" as mentioned in the *Posadas* case (supra), the critical date would be November 8, 1955, the date upon which the petitioners filed their claim. Considering the many re-enactments of each of the sections, it would be rather difficult to say which of the statutes was "later" on that date. In any event, it would be rather absurd to state that, on the last re-enactment of 50 USC App. 1002 prior to November 8, 1955, the Congressional intent to repeal R.S. 1288 by implication was "clear and manifest" since Congress again re-enacted R.S. 1288 in 1956.

Even if we were to violate the "cardinal rule" by repealing R.S. 1288 by implication, the respondent would not be benefited. The Missing Persons Act 50 USC App. 1002 does not contain a condition precedent of honorable and faithful service which a plaintiff must establish. To put such a condition in 50 USC App. 1002 is to violate a cardinal rule of statutory construction. It is a basic rule of construction that a court cannot interpolate a condition into a statute.[20]

---

[19] See Footnote 7, page 42, Brief of the United States.

[20] *Lewis v. United States*, 92 U.S. 618, 621 held:

"Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

Also see *Lewis v. United States* (supra); page 623:

"Neither statute contains any qualification, and we can not interpolate none. Our duty is to execute the law as we find it; not to make it."

It is the duty of the court to execute the law, not to make it.[21]

The respondent's repeated attempts throughout its brief to compare the alleged misconduct of the petitioners with the military offense of desertion and to reconcile such offense with the condition in 50 USC App. 1002 against payment to those who absent themselves from their "post of duty" is a solicitation to this court to indulge in judicial legislation. The alleged misconduct of your petitioners, if anything, is a violation of Articles 104 and 105 of the Uniform Code of Military Justice. (10 USC 904 and 10 USC 905.) These are articles which deal with "aiding the enemy" and "misconduct as prisoners." There is absolutely no similarity between these articles and Article 85 (desertion) and Article 86 (absent without leave) Uniform Code of Military Justice, 1951 (supra).

As heretofore seen (supra page 3) the petitioners were not and could not be guilty of desertion or absence from "post of duty." The question then becomes one of whether the court is going to add to 50 USC App. 1002 another condition precedent of honorable and faithful service. It would seem that the language of the court in *United States v. Chase*, 135 US 255, at page 262, is particularly appropriate here:

"Ashurst, J., said in *Jones v. Smart*, 1 TR 51:
'It is safer to adopt what the legislature have

[21] The petitioners concur with the respondent's statement (page 23, Brief of the United States) that the distinction between accrued and non-accrued pay was clearly drawn in the *Kingsley* case (supra). In fact the basis of the decision on the question of "retained pay" was that the petitioner had not complied with a condition precedent and thus the pay was not accrued.

actually said than to suppose what they meant to say.' In the Queensborough cases, 1 Blight, 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an act of Parliament, and not by the decision of court.'"

WAS THE REFUSAL OF THE DEPARTMENT OF THE ARMY TO PAY PETITIONERS A FORFEITURE?

At page 25 of its brief the respondent states:

> "There is, however, no forfeiture of pay once due. The sole question presented is petitioners' basic right to their pay—i.e., whether they ever became entitled to it—not the taking away of pay already earned, accrued, or due."

And in footnote 20, page 25, the respondent states:

> "... but the pay involved here was *not* accrued and its denial would not be a forfeiture." (Emphasis theirs.)

It is rather difficult to follow the respondent's reasoning in this regard. Military pay is accrued daily and paid bi-monthly unless there is some condition in addition to putting in time. For instance, in the *Kingsley* case, there was a condition precedent to entitlement to retained pay of a receipt of a discharge. Likewise there was a condition precedent to entitlement to travel pay of receipt of a discharge "except by way of punishment for an offense." The same is true nowadays in the case of mustering-out pay, accrued leave pay, and travel pay. The pay is not accrued or earned until the soldier obtains his discharge.

It is noted that 50 USC App. 1002 states:

"... be entitled to receive or to *have credited to his account* the same pay and allowances to which he was entitled at the beginning of such period of absence or *may become entitled thereafter*..?" (Emphasis added.)

37 USC 242 uses the terms:

"... *shall be entitled to receive during his captivity*, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States;" (Emphasis added.)

These are certainly words of present grant.

In the instant case the plaintiffs are claiming regular pay and combat pay which accrued daily from a period prior to their capture until the date of their discharge.

DECISION OF COURT BELOW.

At page 15 of its brief the respondent states that the court below found as a fact that the petitioners "were not persons in 'active service in the army[22] ... of the United States ... captured by hostile forces'" and therefore not entitled to pay under 50 USC App. 1002. Again, on page 20 and in footnote 19, page 25, the respondent stresses that there was a *de novo* hearing below and implies that since there was a finding of fact by the court below that this court is precluded

[22]It is noted that 50 USC App. 1002 states only: "Any person who is in active service and who ..."

from reviewing such facts. This argument is unsound for two reasons.

First: The court below based its decision upon facts which the petitioners continually and repeatedly objected to as being irrelevant and immaterial. The petitioners have, since the filing of the respondent's answer, contended that their alleged misconduct (viz. adhered to, worked for, and collaborated with the enemy) was immaterial to the issues here involved. For this reason they did not attempt to rebut them. The single major question involved in this case is whether or not such alleged misconduct is relevant under each of the statutes involved. The relevance and materiality of the alleged misconduct is a question of law, not a question of fact, and is certainly reviewable by this court.

Second: The court below has held and the respondent argues,[23] that the petitioners' alleged misconduct establish the fact that the plaintiffs were not persons in active service of the Army of the United States. However, the respondent by its answer (R. 4, 5) and by the Stipulation of Facts (R. 8, 13, 16, 18) has ad-

[23] On page 22 of its brief the respondent states:

"Since petitioners were in the service of the enemy after their capture, they were no longer 'in the service of the United States' under R.S. 1288."

Then in Footnote 17, page 22 the defendant goes on to state:

"Petitioners have omitted this requirement of R.S. 1288 in their line-by-line analysis of the statute and the facts in this case."

From a casual reading of R.S. 1288 it is obvious that the term "service of the United States" as used in the statute refers to "privates of any militia or volunteer corps", and does not refer to every . . . private of the regular Army." The petitioners were privates of the regular Army.

mitted that the petitioners were privates first class in the United States Army and were captured. The lower court's own "findings of fact"[24] and the preliminary statement of facts at the beginning of the lower court's decision (R 33) show the petitioners as privates first class in the United States Army.

It is certainly within the province of an Appellate Court to review the findings of the lower court, when the lower court has repeatedly stated a thing to be a fact and then finds as a conclusion that it is not a fact.

The respondent also argues at page 22 that the petitioners were not in "captivity." The same reasoning that applies to whether or not the petitioners were in the service of the United States Army also applies to the question of captivity. (See pages 11, 12 and 13, Brief of Petitioners.)

PRECAPTURE PAY.

The respondent contends on page 26 of its brief that the petitioners' precapture pay is not an issue because the petitioners did not properly raise the issue. The petitioners have raised the issue of their regular pay and the combat pay on each occasion that they have demanded or discussed their claim for pay.

In their initial demand addressed to the Chief of Finance, Department of the Army, on November 8,

---

[24] The court's own findings of fact states (R. 47):

"At the times of their capture as aforesaid the plaintiffs were privates first class in the United States Army."

The stipulation of facts states the same thing. (R. 18.)

1955,[25] the petitioners ask for "all their back pay." (R. 30.) In each pleading, stipulation and brief since that time they have demanded their precapture, combat and regular pay. (See Brief of Petitioners, footnote 3, page 14, and footnote 8, page 25.)

On page 27 of its brief, the respondent states:

> "At any rate, the pre-capture pay can be treated in the same manner as post-capture pay, under the reasoning of this Court and the Army regulations. *U. S. Landers,* 92 US 77, *supra* pp. 18-19; A.R. 35-1030, para. 4. . ."

As seen above (supra page 6) the *Landers* case has no relevancy to the issues here involved as it dealt with (1) a court-imposed forfeiture, (2) a forfeiture applicable only to absence offenses.

A.R. 35-1030 likewise deals only with forfeitures for absence offenses. Since the petitioners are not, and legally could not, be guilty of an absence offense, A.R. 35-1030 could have no application in the instant case.

CONCLUSION.

The respondent throughout its brief has attempted by various means to create conditions precedent in 50 USC App. 1002 and 37 USC 242 which are not in the

---

[25] It is noted that 50 USC App. 1002 provides that the person shall "be entitled to receive . . . the same pay and allowance to which he was entitled at the beginning of such period of absence . . . ." In the petitioners' original demand for pay they demanded "all their back pay". To date the Army has paid them nothing. This would certainly seem to make the issue of the pre-capture pay a relevant and material issue in this case.

sections and were not intended to be in the sections. To accomplish this result it would have the court violate several cardinal principles of statutory construction. (See supra, page 15.)

In the event respondent is not successful in creating a new condition, it seeks to have the court repeal 37 USC 242 by implication when the legislature obviously had no intention of having it repealed. (See supra, page 13.) The respondent's purpose in attempting to repeal 37 USC 242 is to clear the way for an attempt to bring the petitioners within the exclusion in 50 USC App. 1002 dealing with absentees. But the petitioners are not and could not be considered absentees. To consider them as absentees, or to apply to them the laws applicable to absentees is to violate basic principles of military law. (See supra, page 3.)

In the event that all of the above are unsuccessful, the respondent seeks to have the court reconsider the "status of a soldier" and make that status akin to a common law master and servant relationship,[26] thereby

---

[26] At page 19 of its brief, the respondent states:

"The *Landers* holding which is still in full force (A.R. 35-1030), accords with the general principles of the common law governing contracts between private persons, for it is axiomatic that one who wilfully commits a material breach of a contract can recover nothing under it."

The respondent then goes on to cite Williston *Contracts* and the *Restatement of Contracts*. However, see the holdings of the Courts of Appeal in the following cases:

Standard Oil Company v. United States, 153 Fed. 2d 1958, 962:

"We agree with the trial court, that the relationship between government and soldier is more legislative than contractual."

United States v. Brook, 169 Fed. 2d 840, 843:

upsetting the basic principles announced in *In re Grimley*, 137 US 147; *In re Morrissey*, 137 US 157; and *U.S. v. Williams*, 302 US 46.

And again, to accomplish his result the respondent would have the court upset the long line of cases and the statutes which hold that it takes a sentence of a court martial to forfeit pay.

What is the result desired by the respondent? The respondent desires that these three petitioners not be paid. Assuming, for the purpose of argument, that the petitioners do not deserve to be paid, does that justify the precedent which will be established by this case?

If the court were to adopt any of the various theories advanced by the respondent it would be sanctioning a unilateral, administrative, retroactive forfeiture of a serviceman's pay. The principle will go down in the books and will be available for use in the next case

---

"The soldier, upon enlistment, acquires a special and unique military status, quite different from any relationship between the Federal Government and civilians."

Dickenson v. Davis, 245 U.S. 317, 319:

"Service in the military, whether by enlistment or otherwise, creates a status, which is not and cannot be severed by breach of contract, unfortified by a proper authoritative action."

See the decision of the United States Court of Military Appeals in *United States v. Blanton*, 7 USCMA 664, 23 CMR 128:

"An agreement to enlist in an Armed Service is often referred to as a contract. However, more than a contractual relationship is established, what is really created is a status. U.S. v. Grimley, 137 U.S. 147; U.S. v. Dickenson, 20 CMR 154. As a result, no useful purpose is served by reviewing the common-law rules of contract . . ."

which may involve the "ordinary murder, theft or assault" mentioned by the defendants on page 27 of its brief.

Dated, Castro Valley, California,
January 3, 1961.

Respectfully submitted,

ROBERT E. HANNON,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

No. 92.—October Term, 1960.

Otho G. Bell, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Claims.

[May 22, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they behaved with utter disloyalty to their comrades and to their country. After the Korean Armistice in the summer of 1953 they refused repatriation and went to Communist China. They were formally discharged from the Army in 1954. In 1955 they returned to the United States. Later that year they filed claims with the Department of the Army for accrued pay and allowances. When these claims were denied they brought the present action in the Court of Claims for pay and allowances from the time of their capture to the date of their discharge from the Army.[1] The Court of Claims

[1] Each of the petitioners was dishonorably discharged by administrative order of the Secretary of the Army on January 23, 1954. The validity of these administrative discharges is not in issue here, since the petitioners have made no claim for pay and allowances after that date. Compare memorandum to the Chief of Staff from the Judge Advocate General of February 3, 1954, J. A. G. A. 1954/1627, with Opinion Memorandum for the Secretary of Defense from the General Counsel of the Department of Defense of January 25, 1954. See Pasley, Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court Martial? 41 Cornell L. Q. 545; Note, Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases, 56 Col. L. Rev. 709, 735.

decided against them, stating that "[n]either the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs." 181 F. Supp. 668, 674. Judge Madden dissented.[2] We granted certiorari to consider a seemingly important statutory question with respect to military pay. 363 U. S. 837.

The Court of Claims made detailed findings of fact with respect to the petitioners' conduct as prisoners of war, based upon a stipulation filed by the parties.[3] These circumstances need not be set out in minute detail. They are adequately summarized in the opinion of the Court of Claims, as follows:

> "[D]uring the period of their confinement each of the three plaintiffs became monitors for the 'forced study groups,' the sessions of which the prisoners were compelled to attend. Armed guards attended these sessions. The programs included lectures picturing what were declared to be the bad aspects of

[2] Judge Madden stated:

"It is noteworthy that after Congress abolished the historical power of courts-martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law." 181 F. Supp., at 675.

[3] The petitioners did not stipulate that these facts were true, but did agree "that the facts hereinafter set forth shall, for the purposes of this case, be deemed to have been elicited from defendant's witnesses testifying under oath," and that "[t]he facts so elicited, and hereinafter set forth, have not been rebutted by plaintiffs or by plaintiffs' witnesses, and plaintiffs, and each of them, hereby waive the right to testify or to call witnesses to testify in rebuttal of these facts."

life in the United States as contrasted with idyllic life under communism. As monitors, they procured and distributed propaganda literature, and threatened to turn in names of any prisoners who refused to read and discuss favorably these propaganda handouts.

"Each of the plaintiffs made tape recordings which were used as broadcasts and over the camp public address system. Each of them wore Chinese uniforms and were permitted to attend meetings outside the camp. The details of the plaintiffs' consorting, fraternizing and cooperating with their captors and the devious ways in which they sought favors for themselves, thus causing hardship and suffering to the other prisoners, are set out in our findings. . . .

"Two of Bell's recordings were broadcast over the Peiping radio, stating among other things that on the orders of his platoon leader, his men had killed North Korean prisoners of war, and that President Truman was a war monger. In written articles for the camp newspaper he alleged that American troops had committed atrocities and he personally had been ordered to kill women and children and not to take prisoners of war, and that if given the opportunity he would run a tank over the President's body.

"Bell was paid money to write these articles. He also delivered lectures before his company and to the camp on American aggression. He appeared voluntarily in a motion picture and appeared in bimonthly plays. He stated that if given a weapon he would fight against the United States. He sold food intended for the sick to other prisoners of war. By making reports to the Chinese, he caused one man to be bayonetted and others to be placed in solitary confinement.

"Cowart did many similar things, wrote propaganda articles accusing American soldiers of atrocities and of using germ warfare. He drew posters and cartoons for the enemy, acted in plays, walked and talked with the Chinese officers, guards and interpreters, lived part of the time at Chinese regimental headquarters, stated he hated America, desired to study in China and to return to the United States in five years to help in the overthrow of the government.

"Griggs did many similar things, attended enemy parties, visited Chinese headquarters frequently, referred to the Chinese as comrades, was accorded special privileges, made broadcasts, signed leaflets, wrote articles accusing the American soldiers of atrocities and declared the United States had used germ warfare."

As stated in their brief, the petitioners "do not admit to the alleged acts of dishonor contained in the Stipulation and the Findings of Fact, but rather demur to them on the grounds that such facts are irrelevant and immaterial in a civil action for military pay provided by statute." The statute upon which the petitioners rely is an ancient one. It was first enacted in 1814 and has been re-enacted many times. It provides:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall

> not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law." 37 U. S. C. § 242.[1]

Although the plain language of this law appears to entitle the petitioners to their Army pay and allowances during their imprisonment in Korea, the Government has urged various grounds upon which we should hold that the provisions of the statute are inapplicable. We have concluded that none of the theories advanced by the Government can serve as a valid basis to circumvent the unambiguous financial obligation which the law imposes.

The Army's refusal to pay the petitioners was based upon an administrative determination that all prisoners of war who had declined repatriation after the Korean Armistice "advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence."[2] In refusing to honor the

---

[1] The statute was originally enacted on March 30, 1814, as § 14 of "An Act for the better organizing, paying, and supplying the army of the United States." C. 37, § 14, 3 Stat. 113, 115. The provision next appeared as R. S. § 1288. In the 1952 edition of the Code, it appeared at 10 U. S. C. § 846. Title 10, at that time, dealt with the Army and the Air Force. In the 1958 edition of the Code, the provision was transferred to Title 37, c. 4, which covers basic pay and allowances of military personnel.

[2] This position was set out in a letter from the Army Chief of Finance to the petitioners' lawyer, rejecting the petitioners' claims. The letter in its entirety read as follows:

2 October 1956

"Dear Mr. Brown:

"Further reference is made to your inquiries concerning the claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart.

"I have been advised that the following determinations have been made regarding the status of all United States Army Voluntary Non-

petitioners' claims upon this ground, the Army was apparently relying upon a statute enacted in 1939 which made it unlawful to pay from funds appropriated by any Act of Congress the compensation of "any person employed in any capacity by any agency of the Federal Government" who was a member of "any political party or organ-

---

Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

"a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence.

"b. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement now advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence.

"c. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement advocated, or were members of an organization which advocated, during the period from the date of their capture in Korea through the date of their Dishonorable Discharge from the Army, the overthrow of the United States Government by force or violence.

"d. That such persons are not entitled to the payment of salary or wages for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges.

"The claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart may not, therefore, be favorably considered.

"Sincerely yours,

[Signed] "H. W. Crandall
"Major General, USA
"Chief of Finance."

ization which advocates the overthrow of our constitutional form of government in the United States."[6] That this statute was the basis of the Army's decision is evident not only in the language employed in rejecting the petitioners' demands, but also in the pleadings filed in the Court of Claims.[7] We need not, however, now decide the applicability of this statute to members of the Armed Forces, for the reason that the statute was repealed more than a year before the Army relied upon it in refusing to pay the petitioners.[8]

Although this was the only ground ever advanced for the administrative denial of the petitioners' claims, the Government's brief in this Court, for understandable reasons, does not even mention this repealed statute. Instead, the Government now relies upon other grounds to avoid the provisions of 37 U. S. C. § 242. It says that the petitioners violated their obligation of faithful serv-

[6] "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." § 9A, 53 Stat. 1148.

[7] The "Second Affirmative Defense" read in part as follows:

"During the period for which they seek to recover pay and allowances herein, plaintiffs advocated the overthrow of the Government of the United States or were members of a political party or organization which so advocated. Therefore, plaintiffs are not entitled to recover under the provisions of Section 9A of the Act of August 2, 1939 (53 Stat. 1148), as amended."

[8] August 9, 1955, c. 690, § 4 (2), 69 Stat. 625.

ice,' and points to the principle of contract law that 'one who wilfully commits a material breach of a contract can recover nothing under it. 4 Williston, *Contracts* (1936 ed.) § 1022, pp. 2823–4; 5 Williston, *Contracts* (1936 ed.) § 1477; 5 Corbin, *Contracts* (1951 ed.) § 1127, pp. 564–5, see also *Restatement Contracts*, § 357 (1)(a)."

In accord with this principle, the Government argues that in the Missing Persons Act,[10] a statute first enacted in 1942,[11] Congress provided a statutory basis for denying the petitioners' claims. We do not so construe that statute.

Preliminarily, it is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right. In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not of accrued pay.[12] But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be.[13]

---

[9] "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." 10 U. S. C. § 501.

[10] 50 U. S. C. App. § 1001 *et seq.*

[11] 56 Stat. 143.

[12] See Article 57, Uniform Code of Military Justice, 10 U. S. C. § 857.

[13] Unless he is absent without leave or a deserter. *United States* v. *Landers*, 92 U. S. 77; *Dodge* v. *United States*, 33 Ct. Cl. 28; Dig. Ops. JAG Army 265 (1868); Dig. Ops. JAG Army 850 (1912).

This basic principle has always been recognized. It has been reflected throughout our history in numerous court decisions and in the opinions of Attorneys General and Judge Advocates General. "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. . . . By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged." *In re Grimley*, 137 U. S. 147, 151, 152.

Almost a hundred years ago Attorney General Hoar rendered an opinion to the Secretary of War regarding the right to pay of a Major Herod, who had been "charged with murder, arrested, tried by a court-martial and sentenced to be hung." The Attorney General stated:

> "It was not expressly a part of the sentence that Herod should forfeit his pay from the date of his arrest, and I know of no statute imposing a forfeiture of pay from the date of arrest in a case like this of Herod's. The sentence that he be hung necessarily implied a dismissal from the service, but not, as it seems to me, the forfeiture of back pay. I can find no authority for the opinion of the Comptroller that, as Herod was withdrawn from actual military service by his arrest made on account of a crime committed by him, on the general principle that pay follows services; he should not be paid for

JAGA 1952/5875, 2 Dig Ops SENT & PUN § 357; JAGA 1953/1074, 3 Dig Ops PAY § 21.15; Davis, Military Laws of the United States, p. 471, n. 2 (1897); Winthrop, Military Law and Precedents, pp. 645–646 (2d ed. 1920). But see, Comment, Mil. L. Rev.; July 1959 (DA Pam 27-100-9, 1 Jul 60), p. 151. And see generally U. S. Army Special Text 27-157, Military Affairs (1955), pp. 1605–1612.

> the time he was under arrest. The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it in accordance with the provisions of law, whether he has actually performed military service or not." 13 Op. Atty. Gen. 103, 104.

A similar opinion was rendered by Attorney General Alphonso Taft a few years later. He rejected the theory of the Second Comptroller of the Treasury that "[i]f the man, by his misconduct and necessary withdrawal from service, does not perform his part of the contract, the Government cannot be held to the fulfillment of its part thereof." The Attorney General said:

> "The Comptroller has, I think, misconceived the true basis of the right to [military] pay. . . . In the naval, as in the military service, the right to compensation does not depend upon, nor is it controlled by, 'general principles of law'; it rests upon, and is governed by, certain statutory provisions or regulations made in pursuance thereof, which specially apply to such service. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they *actually* perform service or not; unless their right thereto is forfeited or lost in some one of the modes prescribed in the provisions or regulations adverted to." 15 Op. Atty. Gen. 175, 176.

This principle has received consistent recognition in the Court of Claims. "It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigations should obtain

to determine as a matter of fact whether the soldier involved had by conscientious service earned what the statutes allow him." *White* v. *United States*, 72 Ct. Cl. 459, 468. "[T]he mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances. . . . such forfeiture can only be imposed by the sentence of a lawful court-martial." *Walsh* v. *United States*, 43 Ct. Cl. 225, 231.[14]

The statute upon which the petitioners rely applies this same principle to a specialized situation. A serviceman captured by the enemy and thus unable to perform his normal duties is nonetheless entitled to his pay. The rule has commanded unquestioned adherence throughout our history, as two cases will suffice to illustrate.

In 1807 a sailor named John Straughan was a member of the crew of the American frigate *Chesapeake*. After that vessel's ill-starred engagement with the British man-of-war *Leopard* off Hampton Roads, Straughan was taken aboard the *Leopard* and impressed into service in the British Navy. There he served for five years and nine days before he finally was repatriated. Years later his widow sued for his pay and rations as a member of the United States Navy during the period he had been held by the British. The Court of Claims ruled that, even though we had not been at war in 1807, the *Chesapeake* had nevertheless "been taken by an enemy," and that Straughan's widow was entitled to the United States Navy pay and allowances that had accrued while he was serving

[14] See *Conrad* v. *United States*, 32 Ct. Cl. 139; *Carrington* v. *United States*, 46 Ct. Cl. 279. See also Dig. Ops. JAG Army 265 (1868); Dig. Ops. JAG Army 850 (1912). The rule cuts both ways, as the case of *Ward* v. *United States*, 158 F. 2d 499, illustrates. There the plaintiff, a yeoman in the Navy, had actually performed the duties of a land title attorney. He sued to recover the reasonable value of his services, less what he had received as a yeoman. The Court of Appeals approved a dismissal of the complaint, with the comment that "[h]is rating fixed his status and his pay." 158 F. 2d, at 502.

with the British. *Straughan* v. *United States*, 1 Ct. Cl. 324.[15]

In October, 1863, a lieutenant in the Union Army named Henry Jones was taken prisoner by Confederate guerrillas near Elk Run, Virginia. Jones was confined in Libby Prison until March 1, 1865, when he was exchanged and returned to the Union lines. Upon his return he found that he had been administratively dismissed from the service in November, 1863, because he had been in disobedience of orders at the time of his capture. When the Army for that reason refused his demand for pay and allowances, he filed suit in the Court of Claims. The court entered judgment in his favor, stating that "[t]he contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." *Jones* v. *United States*, 4 Ct. Cl. 197, 203.

It is against this background that we turn to the Government's contention that the Missing Persons Act authorized the Army to refuse to pay the petitioners their statutory pay and allowances in this case. The provisions of the Act which the Government deems pertinent are set out in the margin.[16] Originally enacted in 1942 as

---

[15] The case was decided under a statute specifically applicable to naval personnel, originally enacted in 1800, 2 Stat. 45, now 37 U. S. C. § 244. See n. 32, *infra*.

[16] "§ 1001. Definitions

"For the purpose of this Act [sections 1001–1012 and 1013–1016 of this Appendix]—

"(b) the term 'active service' means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph 1(a) (3) above;" 50 U. S. C. App. § 1001. [*Note 16 continued on pp. 13, 14.*]

temporary legislation,[17] the Act was amended and re-enacted several times,[18] and finally was made permanent in 1957.[19] So far as relevant here, this legislation pro-

"§ 1002. Missing, interned, or captive persons. (a) Continuance of pay and allowances.

"Any person who is in the active service . . . and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same . . . pay [and allowances] . . . to which he was entitled at the beginning of such period of absence or may become entitled thereafter . . . and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period. . . . 50 U. S. C. App. § 1002.

"§ 1009. Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death.

"(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001–1012 and 1013–1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001–1012 and 1013–1016 of this Appendix], to

[*Notes 17–19 are on p. 14.*]

vides that any person in active service in the Army "who is officially determined to be absent in a status of . . . captured by a hostile force" is entitled to pay and allowances; that "[t]here shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority;" that the Secretary of the Army or his designated subordinate shall have authority to make all determinations necessary in the administration of the Act, and for purposes of the Act determinations so made as to any status dealt with by the Act shall be conclusive.

We are asked first to hold that "[s]ince the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R. S. 1288 [the statute upon which the petitioners rely], any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act." This step having been taken, we are asked to decide that the petitioners, because of their behavior after their capture, were no longer in the "active service in the Army . . . of the United States," and that they were therefore not covered by the Act. It is also sug-

---

pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: . . . When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. . . ." 50 U. S. C. App. § 1009.

[17] Act of March 7, 1942, 56 Stat. 143.

[18] Act of December 24, 1942, 56 Stat. 1092; Act of July 1, 1944, 58 Stat. 679; § 4 (e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20-21; Act of January 30, 1954, 68 Stat. 7; Act of June 30, 1955, 69 Stat. 238; Act of July 20, 1956, 70 Stat. 595; Act of August 7, 1957, 71 Stat. 341.

[19] Act of August 29, 1957, 71 Stat. 491.

gested, alternatively, that the Secretary of the Army might have determined that each of the petitioners after capture was "absent from his post of duty without authority," and, therefore, not entitled to pay and allowances under the Act. We can find no support for these contentions in the language of the statute, in its legislative history, or in the Secretary's administrative determination.

The Missing Persons Act was a response to unprecedented personnel problems experienced by the Armed Forces in the early months after our entry into the Second World War. Originally proposed by the Navy Department, the legislation was amended on the floor of the House to cover the other services. As the Committee Reports make clear, the primary purpose of the legislation was to alleviate financial hardship suffered by the dependents of servicemen reported as missing.[20]

---

[20] "In general, the purposes of this bill are to provide authorization for the continued payment or credit in the accounts of the pay and allowances of missing persons for a year following the date of commencement of absence from their posts of duty or until such persons have been officially declared dead [In December, 1942, the statute was amended so as to permit a department head to continue personnel in a missing status for an indefinite period. 56 Stat. 1092]; the continued payment for the same period of the allotments for the support of dependents and for the payment of insurance premiums, and for regular monthly payments to the dependents of missing persons, in the same manner in which allotments are paid, in those instances in which the missing persons had neglected to provide for their dependents through the medium of allotments, such payments to be deducted from the pay of the missing persons in the same manner in which allotments are paid.

"The Navy Department advised the committee that many instances have occurred during recent months of personnel having been reported as missing, and in accordance with requests received from disbursing officers carrying the pay accounts, the allotments of such persons were discontinued. Because of stoppage of allotments and

To hold that the Missing Persons Act operated to repeal the statute upon which the petitioners rely would be a long step to take, for at least two reasons. In the first place, the record of the hearings of the Senate Committee on Naval Affairs clearly discloses that at the time the Missing Persons Act was being considered, the Committee was made fully aware of the 1814 statute, and manifested no inclination to disturb it.[21] Secondly, it is not entirely accurate to say, as does the Government, that the Missing Persons Act is "later in time." After the original passage of that Act in 1942, the statute upon which the petitioners rely was recodified in 1952 and again in 1958.[22]

But the question whether there was a repeal by implication is one that we need not determine here, for it is clear that under either statute the petitioners are entitled to the pay and allowances that accrued during their detention as prisoners of war. The Missing Persons Act

---

the withholding of pay of missing persons, dependents of personnel concerned have experienced great hardships in a large number of cases. The committee are advised that this situation is aggravated by the fact that, so long as a person is declared to be missing and has not been officially declared dead, the 6 months' death gratuity is not payable." H. R. Rep. No. 1680, 77th Cong., 2d Sess., pp. 3, 5.

[21] The Committee was advised by a representative of the Marine Corps as follows: "Section 1288, Revised Statutes (sec. 846, title 10, U. S. Code), provides that noncommissioned officers and privates shall be entitled to receive during their captivity by an enemy, notwithstanding the expiration of their terms of service, the same pay, subsistence, and allowances to which they may be entitled while in the actual service of the United States. This applies only to enlisted personnel, and I know of no such law affecting the pay and allowances of officers and nurses. The proposed legislation would also authorize the crediting, in the account of the individual concerned, of the same pay and allowances received at the time an individual is reported as missing or missing in action until his status is determined by competent authority." Hearings before the Senate Committee on Naval Affairs on H. R. 6446, 77th Cong., 2d Sess., pp. 13-14.

[22] See note 4.

unambiguously provides that any person "in the active service . . . officially determined to be absent in a status of . . . captured by a hostile force . . . [is] entitled to receive or to have credited to his account the same . . . pay [and allowances] to which he was entitled at the beginning of such period of absence. . . ." It affirmatively appears on this record that the petitioners were in the active service of the Army, that they were in fact captured by the enemy, and that they were later officially determined to be "absent in a status of . . . captured by a hostile force." The terms of the Missing Persons Act are therefore expressly applicable.

The argument that it was open to the Secretary of the Army to determine that the petitioners in the prison camps to which they were taken were thereafter "not in the active service" cannot survive even cursory analysis. In the Armed Forces the term "active service" has a precise meaning, a meaning not dependent upon individual conduct. 10 U. S. C. § 101.[23] Moreover, the verbal structure of the Act, re-enforced by common sense, clearly leads to the conclusion that "active service" refers to a person's status at the time he became missing. Nothing in the legislative history of the original statute or of its many re-enactments offers support for any other construction. That history simply reflects a continuing pur-

[23] A House Committee Report concerning a proposed amendment to the Act sets forth a letter from the Secretary of the Army clearly showing his understanding that "active service" was employed in the statute as a technical phrase embodying a technical status: "Also, the proposal would amend section 2 of the Missing Persons Act to provide coverage for persons on training duty under certain conditions, in addition to persons on active service." H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 7. See also H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 8; H. R. Rep. No. 888, 85th Cong., 1st Sess., p. 3; H. R. Rep. No. 2354, 84th Cong., 2d Sess., p. 3; S. Rep. No. 573, 85th Cong., 1st Sess., p. 4; S. Rep. No. 970, 85th Cong., 1st Sess., p. 7; S. Rep. No. 2552, 84th Cong., 2d Sess., p. 3.

pose to widen the classes of persons to whom the benefactions of the law were to be extended, from the time those persons became missing.[24]

The Government's alternative argument seems, as a matter of statutory construction, equally invalid. The legislative history discloses that the provision denying pay to a person officially determined to have been "absent from his post of duty without authority" was enacted to cover the case of a person found to have been "missing"

---

[24] For example, when the statute was amended in 1957 to extend coverage to those in "full-time duty training, other full-time duty, or inactive duty training," an Army spokesman testifying before the House Subcommittee expressed the clear view that "active service" referred to the moment the person entered a missing status. "The purpose of that . . . is to insure that people who are in a nonpay status at the time they enter in a missing or missing-in-action status are covered. . . . Under the present wording of the bill it is conceivable that being in a nonpay status at the time that he enters into a missing status his survivors would not be entitled to any pay or allowances. This would insure that they would be entitled to the pay and allowances that he would have had, had he been on active duty at the time that he entered into a missing status." Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2404, 85th Cong., 1st Sess., p. 563.

In S. Rep. No. 970, 85th Cong., 1st Sess., the Committee on Armed Services stated: "Coverage would be extended to members of the Reserve components while they are performing full-time training duty, other full-time duty, and inactive duty training with or without pay. Members of the Reserve components entering a missing status while performing duty of the types enumerated would have credited to their pay accounts the same pay and allowances that they would receive if they were performing full-time active duty. Some reservists participate in training without pay, such as weekend proficiency flights in aircraft, and this amendment is intended to treat them as if they were on active duty when they entered a missing status." P. 3. Similar statements may be found in H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 3, and H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 2. Certainly the thrust of these statements is a primary concern with status at the time the missing status is first entered.

in the first place only by reason of such unauthorized absence.[25] Moreover, desertion and absence without leave are technically defined offenses. 10 U. S. C. § 885, 10 U. S. C. § 886; see Manual for Courts-Martial, United States, p. 315 (1951). It is open to serious question whether the conduct of the petitioners after their capture could conceivably have been determined to be tantamount either to desertion or absence without leave. See Axins, Law of AWOL, p. 167 (1957); Snedeker, Military Justice under the Uniform Code, p. 562 (1953).

These are questions which we need not, however, pursue. We need not decide in this case that the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service, or that they were absent from their posts of duty. Nor need we finally decide whether either such determination by the Secretary would have been valid as a matter of law. The simple fact is that no such administrative determination has ever been made. The only reason the Army ever advanced for refusing to pay the petitioners was its determination that they had "advocated, or were members of an organization which advocated, . . . the overthrow of the United States Government by force or violence."[26] That determination has now been totally abandoned. The Army has never even purported to determine that the petitioners were not in active service or that they were absent from their posts of duty.[27] The Army cannot rely upon something that never happened, upon an adminis-

---

[25] See H. R. Rep. No. 1680, 77th Cong., 2d Sess., p. 5; Hearings before House Committee on Naval Affairs on H. R. 4405, 78th Cong., 2d Sess., p. 2316.

[26] See note 5, *supra*.

[27] Nor has the Army ever purported to determine that the petitioners were not in "captivity" or "in the actual service of the United States" within the meaning of 37 U. S. C. § 242.

trative determination that was never made, even if it be assumed that such a determination would have been permissible under the statute and supported by the facts.[28]

---

[28] The record of a 1954 hearing before the House Armed Services Committee on a bill to extend the life of the Missing Persons Act indicates that some thought was being given at that time to the possibility of an administrative determination that the petitioners were absent from their posts of duty:

"Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?

"General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.

"Mr. Kilday. When does that stop?

"Mr. Bates. Does that stop next week?

"General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.

"Mr. Bates. Aren't they absent without leave?

"General Powell. No, sir.

"Mr. Bates. What is it?

"General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.

"Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?

"General Powell. That is a matter still to be decided by the Secretary of Defense.

"Mr. Bates. Or deserters, you know.

"General Powell. The Secretary of Defense is deciding for all services.

"The Chairman. Call the roll. It is not necessary to call the roll. There is no objection, is there?

"(Chorus of 'No.')

"Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.

"General Powell. Sir, the Secretary of Defense must make a decision, including phychological [*sic*] factors, individual rights, the law involved, and national policy.

"Mr. Vinson. That is right. [*Note 28 continued on p. 21.*]

See *Service* v. *Dulles*, 354 U. S. 363; *Vitarelli* v. *Seaton*, 359 U. S. 535. For these reasons we hold that the petitioners were entitled under the applicable statutes to the pay and allowances that accrued during their detention as prisoners of war.

Throughout these proceedings no distinction has been made between the petitioners' pay rights while they were prisoners and their rights after the Korean Armistice when they voluntarily declined repatriation and went to Communist China. Since both the Army and the Court of Claims denied the petitioners' claims entirely, no separate consideration was given to the petitioners' status after their release as prisoners of war until the date of their administrative discharges. Nor did the petitioners in this Court address themselves to the question of the

---

"General Powell. He has not as yet announced such a decision to us.

"Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?

"The Chairman. Sure.

"Mr. Van Zandt. Oh, yes.

"Mr. Cunningham. Why so? They are not to blame for this.

"Mr. Bishop. No, they are not.

"Mr. Vinson. Well, if a man is absent without leave—

"Mr. Cunningham. A man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?

"The Chairman. Wait, one at a time. The reporter can't get it.

"Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

"Mr. Kilday. That is inherent. When a man is court-martialed—

"The Chairman. Without objection, the bill is favorably reported." Hearings before House Committee on Armed Services on H. R. 7209, 83d Cong., 2d Sess., pp. 3071–3072.

petitioners' rights to pay during that interval. Yet, it is evident that the petitioners' status during that period might be governed by considerations different from those which have been discussed. Other statutory provisions and regulations would come into play. Accordingly we express no view as to the petitioners' pay rights for the period between the Korean Armistice and their administrative discharges, leaving that question to be fully canvassed in the Court of Claims, to which in any event this case must be remanded for computation of the judgments.

The disclosure of grave misconduct by numbers of servicemen captured in Korea was a sad aftermath of the hostilities there. The consternation and self-searching which followed upon that disclosure are still fresh in the memories of many thoughtful Americans.[29] The problem is not a new one.[30] Whether the solution to it lies alone in subsequent prosecution and punishment is not for us to inquire.[31] Congress may someday provide that mem-

---

[29] See Report by the Secretary of Defense's Advisory Committee on Prisoners of War (1955).

[30] In 1333 John Culwin was charged with having sworn allegiance to his Scottish captors. 1 Hale, Historia Placitorum Coronae 167–168 (1736). The earliest reported American case of prisoner of war misconduct appears to be *Respublica* v. *McCarty*, 2 Dall. 86 (Supreme Court of Pennsylvania, 1781). During the Civil War thousands of captives on each side defected to the enemy. See H. R. Rep. No. 45, 40th Cong., 3d Sess., pp. 223, 742–777 (1869). Report by the Secretary of Defense's Advisory Committee on Prisoners of War p. 51 (1955). Two treason trials grew out of prisoner of war misconduct during World War II. *United States* v. *Provoo*, 124 F. Supp. 185, rev'd. 215 F. 2d 531, aff'd. 350 U. S. 857. *United States ex rel. Hirshberg* v. *Malonaphy*, 73 F. Supp. 990, rev'd. 168 F. 2d 503, rev'd *sub nom. United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210. More than forty British prisoners of war were brought to trial for misconduct. See note, 56 Col. L. Rev. 709, 721 (1956).

[31] Upon their return to the United States in July 1955, the petitioners were confined by the United States Army in San Francisco, California, to await trial by general court-martial for violation of

bers of the Army who fail to live up to a specified code of conduct as prisoners of war shall forfeit their pay and allowances. Today we hold only that the Army did not lawfully impose that sanction in this case.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Article 104 of the Uniform Code of Military Justice. In November of that year they were released from confinement by virtue of writs of habeas corpus issued by a Federal District Court on the authority of *Toth* v. *Quarles*, 350 U. S. 11. There have been several court-martial prosecutions growing out of alleged misconduct by Army prisoners of war in Korea. See *United States* v. *Dickenson*, 17 C. M. R. 438, 20 C. M. R. 154; *United States* v. *Flood*, 18 C. M. R. 362; *United States* v. *Batchelor*, 19 C. M. R. 452, 22 C. M. R. 144; *United States* v. *Olson*, 20 C. M. R. 401, 22 C. M. R. 250; *United States* v. *Gallagher*, 21 C. M. R. 445; *United States* v. *Rader*, 22 C. M. R. 487; *United States* v. *Allen*, 25 C. M. R. 60; *United States* v. *Fleming*, 19 C. M. R. 438. See the discussion of these cases in Prugh, Justice for All: REDCAP-K, Army Combat Forces Journal, November 1955, p. 15. Note, 56 Col. L. Rev. 700.

A statute relating to the right to pay of members of the United States Navy who are taken prisoner does appear to require a showing of conduct after capture:

"The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them, until their exchange, discharge, or death." 37 U. S. C. § 244.

No reported case has been found holding that this standard of conduct was not met. Cf. *Straughan* v. *United States*, 119 Ct. Cl. 624, discussed in text, *supra*, p. —.